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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1670

SUFFOLK OUTDOOR ADVERTISING COMPANY,

Appellant,

v.

THEODORE O. HULSE, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

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Pursuant to Rule 16(1)(b) of the Rules
of the Supreme Court of the United
States, appellees move the Court to dis-
miss the appeal herein on the ground
that the appeal does not present a sub-
stantial federal question.

STATEMENT

This is an appeal from a judgment of the Court of Appeals of the State of New York, which sustained the constitutionality of the provisions of the zoning ordinance of the Town of Southampton relating to billboards, against a constitutional challenge on the face thereof. The facts underlying the appeal are as hereinafter set forth.

The pertinent sign regulations of the subject zoning ordinance (A163-A168; references preceded by "A" are to the Appendix in the court below) were adopted and became effective in May of 1972. Section 3-50-60.07 prohibits billboards in all districts, except that the Town may establish special

public information centers wherein approved directional signs for businesses may be located (A165). Billboards are defined in Section 1-30-20.68, and in essence consist of off-premises or non-accessory signs (A163). Section 3-50-60.03 prohibits flashing and moving signs in all districts, except time and temperature information (A165). Section 3-110-70.03 declares that non-conforming billboards and flashing and moving signs shall become unlawful structures on June 1, 1975, and shall thereupon be removed (A166). Section 3-110-70.04 provides as follows (A166):

"Any owner of any such nonconforming billboard or flashing or moving sign, except as provided in Section 3-50-60.03, who alleges that the period herein provided for amortization of such sign is unreasonable as to a particular sign may apply to the Town

Board for an extension of time for amortization of such sign. If the Town Board finds that the construction cost of a particular sign would not be reasonably amortized by the aforesaid date, then the Town Board may extend the amortization period to a date which it finds would provide a reasonable amortization period. In no event however, shall the total amortization period for a particular job extend beyond a date which would result in amortization of the construction cost of a particular sign at a rate of less than \$100.00 per year, computed on a "straight line" basis."

Appellant is the owner of billboards situate at various locations in the Town (A36-A37). Appellant challenged the constitutionality of the subject ordinance provisions on their face and as applied to appellant's existing billboards (A107-A117). Appellees moved for judgment dismissing each and every cause of action (A60-A61, A72-A75), and the issues in this case were determined

by the courts below in the procedural context of appellees' motion. The Court of Appeals of the State of New York declared that the subject ordinance provisions are constitutional on their face; the Court dismissed the claim that such provisions are unconstitutional as applied to appellant's existing billboards, because appellant has not exhausted the administrative remedy available under the ordinance (Suffolk Outdoor Advertising Co. v. Hulse, 43 NY2d 483).

At the outset, it should be noted that the free speech and due process issues raised in appellant's jurisdictional statement are somewhat inaccurately characterized in appellant's description of the "Questions Presented". The free speech issue does not involve

expulsion of an entire medium of mass communication (outdoor advertising signs) - the ordinance does prohibit off-premises or non-accessory outdoor advertising signs, but the ordinance permits on-premises or accessory outdoor advertising signs. Furthermore, the description of the justification as a "perception" that the medium offends aesthetic values ignores the inherent nature of billboards - as the court below correctly noted, it cannot be seriously argued that the subject prohibition is not reasonably related to improving the aesthetics of the community. The due process issue does not involve a "concession" that continuance of appellant's billboards will not adversely affect the public welfare - since

aesthetics constitutes a public welfare justification for exercise of the police power, it must be conceded that continuance of appellant's billboards will adversely affect the public welfare. Moreover, appellant's description of the due process issue ignores the fact that the ordinance provides for a reasonable amortization period before removal of the billboards is required.

The Town of Southampton is a rural town located in Suffolk County, Long Island, New York, and it is located in the easterly part of Long Island. There are five incorporated villages (the villages of Westhampton Beach, Quogue, Southampton, Sag Harbor and North Haven) situate within the Town of Southampton, each of which have their own governing

bodies and ordinances, including zoning ordinances. The subject zoning ordinance is effective and operative only in that portion of the Town outside of the incorporated villages.¹

The Town of Southampton contains unique physical characteristics upon which its significant resort economy, shellfish industry and agricultural economy are based. These unique physical characteristics include the Atlantic Ocean and barrier beach, which provide a lengthy shoreline of magnificent ocean beach, the streams, estuaries and bays, the large areas of open farmlands with good

¹ The population and other figures set forth in appellant's jurisdictional statement include the portions of the Town situate within the incorporated villages.

agricultural soils, and the ridge of the Ronkonkoma Moraine with its large areas of wooded land and panoramic views.²

Most of the land area in the Town of Southampton is zoned for residential land use.³ In this connection, it should be noted that appellant's statement that each of its signs is located on or adjacent to a major commercial thoroughfare is simply not true. The Town has rejected the concept of continuous "strip commercial" development along the highways, and thus it has

² Town of Southampton Master Plan (1970) at p. 1-5.

³ Town of Southampton Master Plan (1970) at p. 35-48; Building Zone Map For The Town Of Southampton (1972).

zoned a substantial portion of the land area along the highways for residential land use, business land uses being concentrated in various locations at appropriate intervals. As a result, many of appellant's signs are located in residence districts.⁴

Appellant's statement that the Town's planners expect its population to reach 250,000 by the end of the next decade is also erroneous and/or misleading. The Town's planners have recommended that the ultimate population potential for the portion of the Town outside of the incorporated villages be limited to

⁴ Town of Southampton Master Plan (1970) at p. 43-47 and Future Land Use Map at the end thereof; Building Zone Map For The Town Of Southampton (1972).

91,500 persons on a year around basis.⁵

ARGUMENT

I. THE FREE SPEECH ISSUE RAISED IN APPELLANT'S JURISDICTIONAL STATEMENT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The court below held that the zoning ordinance provisions relating to billboards do not violate freedom of speech. Appellees contend that the free speech issue in this case does not present a substantial federal question, and appellees' contention is fully supported by Markham Advertising Co. v. State of Washington (73 Wash.2d 405, 439 P.2d 248, app. dismissed for want of a substantial federal question 393 U.S. 316, reh. den. 393 U.S. 1112).

⁵ Town of Southampton Master Plan (1970) at p. 29 and 55.

Markham Advertising Co. v. State of Washington (*supra*) involved a state statute which prohibited billboards⁶ and which required removal of pre-existing billboards after a specified period of time (4 years for billboards located in commercial or industrial zones, and 3 years for other billboards). The Supreme Court of Washington rejected the contention that the statute violated freedom of speech, and this Court dismissed the appeal for want of a substantial federal question.

Appellant seeks to overcome Markham by characterizing it as "seemingly outdated" and by stating that the only

⁶ The definition of billboards in the case at bar is essentially the same as the prohibition in Markham, with some insignificant differences.

First Amendment authority for the judgment of the Supreme Court of Washington was Valentine v. Chrestensen (316 U.S. 52). In other words, appellant suggests that Markham was based solely on the outdated notion that commercial speech is not entitled to First Amendment protection. However, appellant's suggestion is erroneous, and appellant's attempt to overcome Markham is of no avail.

The Supreme Court of Washington did not decide Markham solely on the authority of Chrestensen. In Markham the Supreme Court of Washington held that the public's right to enjoy highways free of the dangerous, obtrusive and unsolicited presence of advertising structures outweighed the minimal free speech interest at stake. In its

decision, the court considered among other things the intrusive quality of highway outdoor advertising, the scenic beauty of the state, the hazard to traffic safety, and the purely commercial nature of the speech at stake. In addition to citing Chrestensen, the court cited Packer Corp. v. Utah (285 U.S. 105) as support for the nature of billboards and Kovacs v. Cooper (336 U.S. 77) as support for its conclusion on the free speech issue. Kovacs v. Cooper (supra) has frequently been cited by this Court for the proposition that reasonable time, place and manner restrictions applicable to speech are constitutional. Thus it seems abundantly clear that Markham was decided on the basis that the state statute

constituted a reasonable place and manner restriction under the very same First Amendment test which is applicable to the case at bar.

After attempting to overcome Markham, appellant asserts that the subject ordinance provisions are unconstitutional under more recent free speech precedents of this Court. In the first place, appellant's assertion is based upon the erroneous premise that the subject ordinance totally prohibits outdoor advertising signs. The subject ordinance does prohibit billboards, which in essence consist of off-premises or non-accessory signs, in all districts (except that the Town may establish special public information centers wherein approved directional signs for businesses may be

located). However, the ordinance permits on-premises or accessory signs (subject to reasonable regulations). Thus the ordinance does not totally prohibit outdoor advertising signs - it regulates the same as to place and circumstances by prohibiting off-premises or non-accessory signs (billboards) and permitting on-premises or accessory signs.⁷ The court below recognized this in pointing out that the ordinance does permit an operative means of advertising and in holding that the subject ordinance constitutes a place and manner restriction.

⁷ The mere fact that the outdoor advertising signs involved in the case at bar constitute billboards does not convert the subject ordinance into a total prohibition of outdoor advertising signs.

Once it is recognized that the subject ordinance constitutes a place and manner restriction, it becomes clear that the free speech issue is not substantial. The free speech issue focuses on whether the ordinance serves an interest related or unrelated to the suppression of free speech, whether the impact on speech is significant or incidental, and whether such impact is justified by the interest served (see Linmark Assoc. Inc. v. Township of Willingboro, 431 U.S. 85; Young v. American Mini Theatres, Inc., 427 U.S. 50). The principal purpose of the subject ordinance is to promote aesthetics and preserve community appearance. Therefore, it is abundantly clear that the subject ordinance serves an interest unrelated to

the suppression of free speech. The subject ordinance does not single out speech of a particular content and prohibit dissemination thereof in any manner whatsoever (cf. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748) or even in a particular manner (cf. Linmark Assoc. Inc. v. Township of Willingboro, supra).

Indeed, in pointing out that the ordinance involved in Linmark served an interest related to suppression of free speech⁸, this Court expressly indicated that aesthetic values are unrelated to the suppression of free speech (see

⁸ The ordinance prohibited "For Sale" signs and the purpose was to suppress communication of the fact that a home was for sale. The municipality feared that potential recipients of the message would act upon it.

431 U.S. 85, 97 S.Ct. at p. 1619). As the court below correctly held, the subject ordinance makes no attempt to regulate the content of the commercial speech appearing on outdoor advertising signs but rather regulates only the place and manner in which outdoor advertising signs may be maintained.

Furthermore, the interest served by the subject ordinance - preservation of community appearance and character - is a legitimate governmental interest which constitutes the essence of zoning. This Court recognized this zoning interest as an important or substantial governmental interest in Young v. American Mini Theatres, Inc. (supra, 96 S.Ct. at p. 2448 & 2452-2453; see also the concurring opinion of Mr. Justice Powell, 96

S.Ct. at p. 2453-2454, 2455 & 2457).

Moreover, the impact of the subject ordinance on speech is clearly limited and incidental. It is only off-premises or non-accessory signs which are prohibited; on-premises or accessory signs are permitted. In addition to on-premises or accessory advertising signs, other ample alternative channels for communication are left open - such as newspaper, radio and television advertising, or even handbills or leaflets.

In view of the foregoing, it is clear that the subject ordinance does not violate freedom of speech under the recent free speech precedents of this Court. In this connection, it must be kept in mind that the minimal free speech interest at stake (see Cromwell v.

Ferrier, 19 NY2d 263, 271-272 [outdoor advertising has become a less and less important facet of the advertising business]) is dependant upon erection of permanent structures - the outdoor advertising structures upon which the message appears (see Kovacs v. Cooper, 336 U.S. 77 [free speech interest dependant upon mechanical voice amplification]). The very existence of these unsightly, intrusive structures (see Packer Corp. v. Utah, 285 U.S. 105, 110) is directly related to the principal purpose of the subject ordinance (aesthetics), and the subject prohibition clearly promotes the purpose of preserving the natural beauty and community appearance of the rural Town of Southampton. Thus the governmental interest served by the subject

ordinance clearly outweighs the limited impact on speech (see Kovacs v. Cooper, supra; Markham Advertising Co. v. State of Washington, supra).

In conclusion, it is respectfully submitted that there is nothing in the recent free speech precedents of this Court (subsequent to Markham) which indicates that the free speech issue involved in the case at bar has become a substantial federal question. Indeed, in discussing the First Amendment and recent commercial speech precedents, this Court recently stated that a "state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere" (Young v. American Mini Theatres, Inc., supra, 96 S.Ct. at p. 2451), citing Markham

Advertising Co. v. State (73 Wash.2d 405, 439 P.2d 248, app. dismissed for want of a substantial federal question 393 U.S. 316).

Appellant's reliance on Linmark Assoc. Inc. v. Township of Willingboro (supra) is misplaced. Linmark involved prohibition of speech of a particular content by a particularly appropriate channel of communication ("for sale" signs in front of the house to be sold), whereas the subject ordinance does not single out speech of a particular content and does permit on-premises or accessory signs. Appellant's reliance on Erznoznik v. City of Jacksonville (422 U.S. 205) is also misplaced, because Erznoznik involved an ordinance which singled out speech of a particular content. In

Erznoznik, this Court expressly pointed out that cases involving place and manner restrictions are decided on different standards than cases involving restrictions directed at content (see 422 U.S. at p. 208-209, citing Kovacs v. Cooper and other cases). Appellant's reliance on Baldwin v. Redwood City (540 F.2d 1360, cert. den. 431 U.S. 913) is also misplaced, because Baldwin involved "political" speech (the First Amendment interest with respect to "political" speech is substantial) and temporary signs, whereas the case at bar involves "commercial" speech (which constitutes a different class - see, eg., Young v. American Mini Theatres, Inc., supra [especially 96 S.Ct. at p. 2451, ftn 32]) and permanent outdoor

advertising structures.

II. THE DUE PROCESS ISSUE RAISED IN APPELLANT'S JURISDICTIONAL STATEMENT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The court below held that the zoning ordinance provisions relating to billboards are constitutional on their face, in that they constitute a valid exercise of the police power. The court below further held that appellant could not attack the constitutionality of the subject ordinance as applied to appellant's existing billboards without exhausting the administrative remedy available under the ordinance, and thus the court below affirmed dismissal of appellant's unconstitutional "as applied" claim for failure to exhaust the administrative remedy. Appellant contends that the due

process issue raised in its jurisdictional statement presents a substantial federal question.

In order to understand the nature of the due process issue raised by appellant, it is necessary to analyze and distinguish the "prohibitory" provision and the "removal" provision of the subject ordinance. The "prohibitory" provision (Section 3-50-60.07) prohibits billboards in all districts. The effect of such provision is that no new billboards may be erected. With respect to appellant's existing billboards, such provision simply renders them nonconforming (which would mean that they could continue to be maintained were it not for the "removal" provision). The "removal" provision (Sections 3-110-70.03

& 3-110-70.04) requires removal of existing billboards after a period of time (a so-called amortization period). The "removal" provision provides a minimum amortization period of about three years (Section 3-110-70.03) and provides an administrative remedy authorizing the Town Board (upon application of a billboard owner) to extend the amortization period if the minimum amortization period is unreasonable as applied to a particular billboard (Section 3-110-70.04). The administrative remedy would result in a determination as to a reasonable amortization period.

The due process issue raised by appellant in its jurisdictional statement is whether a municipal ordinance requiring removal of appellant's property without

compensation deprives appellant of property without due process of law. Insofar as the case at bar is concerned, the only question presented by such issue is whether amortization of nonconforming uses or structures (to wit, termination of nonconforming uses or structures after a period of time without compensation) is per se unconstitutional.

Stated another way, the only question presented is whether it is per se unconstitutional for a municipality to require elimination of nonconforming uses or structures through the exercise of the police power by the amortization method, as distinguished from the exercise of the power of eminent domain. Such question constitutes a constitutional question "on the face" of the

ordinance.⁹ The court below held that a municipality can constitutionally invoke the police power amortization method of eliminating nonconforming uses or structures - the court below sustained the constitutionality of the concept of amortization (Suffolk Outdoor Advertising Co. v. Hulse, 43 NY2d 483; Modjeska Sign Studios, Inc. v. Berle, 43 NY2d 468).

Appellees contend that the limited due process issue raised by appellant does not present a substantial federal

⁹ There is no issue before this Court as to the constitutionality or reasonableness of the amortization period applicable to appellant's existing billboards, which issue would constitute an "as applied" constitutional question. The court below did not determine the "as applied" constitutional question, but rather held that such question is premature, because appellant has not exhausted the administrative remedy.

question. Stated another way, appellees contend that there is no substantial federal question with respect to the constitutionality of the concept of amortization. Appellees' contention is fully supported by Markham Advertising Co. v. State of Washington (73 Wash.2d 405, 439 P.2d 248, app. dismissed for want of a substantial federal question 393 U.S. 316, reh. den. 393 U.S. 1112) and by other cases involving the constitutionality of the amortization method of eliminating nonconforming uses or structures (see 1 Anderson, American Law Of Zoning [2nd Ed.], §6.67 [especially the cases cited at p. 509-510, ftn 25]; see also Art Neon Co. v. City and County of Denver, 488 F.2d 118, cert. den. 417 U.S. 932).

In Markham Advertising Co. v. State of Washington (supra) the Supreme Court of Washington sustained the constitutionality of a state statute which utilized the amortization concept in order to eliminate existing outdoor advertising signs, and this Court dismissed the appeal for want of a substantial federal question. In Art Neon Co. v. City and County of Denver (supra), the Tenth Circuit Court of Appeals sustained the constitutionality of the amortization concept utilized to eliminate existing outdoor advertising signs, and this Court denied the petition for writ of certiorari. Therefore, it is respectfully submitted that the due process issue raised by appellant does not present a substantial federal question.

CONCLUSION

For the foregoing reasons, appellees
move that this appeal be dismissed.

June 1978

Respectfully submitted,

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